# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 773

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, ET AL., PETITIONERS

*v.*

FRANK W. MCCULLOCH, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 8a–9a, 102a–114a) have not yet been officially reported. The opinion of the district court (Pet. App. 1a–6a) is unreported. The underlying decision and order of the Board (Pet. App. 64a–100a) are reported at 159 NLRB No. 145.

### JURISDICTION

The decisions of the court of appeals were entered on July 31, 1967 (Pet. App. 8a, 102a). The petition for a writ of certiorari was filed on October 30, 1967.



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The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

The petition seeks review of actions taken by the court of appeals in two companion cases. In the first case (No. 16012), the court enforced an order of the National Labor Relations Board requiring the employer to bargain with respect to a unit of employees which both the employer (who was a party to the court of appeals proceeding) and petitioner employees (who intervened in that proceeding) contended was improperly constituted under the National Labor Relations Act. In the second case (No. 15609), the court of appeals affirmed the judgment of the district court, dismissing for lack of jurisdiction, a suit brought by petitioner employees seeking in the main review of the identical issue involved in No. 16012. The following questions are presented:

1. Whether the court of appeals properly sustained the Board's conclusion that, in the circumstances of this case, the employer was not justified in withdrawing recognition from a bargaining unit which it had recognized for more than 13 years, even though the Board's original certification of that unit may have been invalid.[1]

[1] The same question is presented by the employer's petition in *International Telephone and Telegraph Corp.* v. *National Labor Relations Board, et al.*, No. 772, this Term. Since the arguments advanced by petitioners with respect to that question are essentially the same as those advanced by the employer in No. 772, we shall not deal with that question here but respectfully refer the Court to our opposition in No. 772 (a copy of which has been served on petitioners).

2. Whether the court of appeals properly concluded that Congress had provided petitioner employees with an available forum, *i.e.*, the Board, with review in the court of appeals, for litigation of the matter complained of, and thus that district court jurisdiction was lacking.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition, pp. 3–4.

## STATEMENT

As more fully set forth in the Board's brief in opposition in No. 772, this Term, a companion case, in 1951 the Board, after an election, certified Local 400, International Union of Electrical, Radio & Machine Workers, AFL–CIO, as the representative for an engineer-technician unit which consisted of both professional and non-professional employees of the Company; the election did not afford the professional employees the opportunity, as provided for in Section 9(b)(1) of the Act, to vote separately on whether they desired to be grouped in a mixed bargaining unit with non-professional employees. *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395. Thereafter, the Company and Local 400 entered into a series of agreements covering the engineer-technician unit, the last of which expired by its terms on September 9, 1964. In the course of the 1964 negotiations for a new contract, Local 400 filed an unfair labor practice charge against the Company, alleging that it was not bargaining in good faith (Pet. App. 2a). On October 7, 1964, after

a complaint had issued on that charge, certain employees in the engineer-technician unit (petitioners here) filed with the Board a petition seeking an election for the purpose of severing the professional employees from the remainder of the unit. The next day the Company formally withdrew recognition from Local 400 as the representative of the engineer-technician unit, and filed two petitions of its own with the Board seeking representation elections involving that unit. Local 400 then filed additional unfair labor practice charges against the Company, alleging that the withdrawal of recognition constituted a further unlawful refusal to bargain. The outstanding complaint was amended to include this charge. The petitions filed by the employees, and the two filed by the Company, were dismissed by the Board because of the pendency of the unfair labor practice proceeding against the Company (Pet. App. 2a–3a).

On December 16, 1964, at the opening of the unfair labor practice proceeding, the Trial Examiner telephoned counsel for petitioner employees, informed him of the status of the proceeding and the issues involved,[2] and invited him to intervene on behalf of his clients. He declined to participate in the Board proceeding, but instead filed a suit in the United States District Court for the District of New Jersey (Pet. App. 3a–4a). By their complaint, petitioners sought to have the district court set aside the Board's 1951 bargaining unit certification, or, in the alternative, set

[2] The Company, in its answer, had specifically alleged that the engineer-technician unit was an illegally constituted unit (Pet. App. 3a).

aside the Board's order dismissing their decertification petition. The Board moved to dismiss the complaint on the ground, *inter alia,* that the district court lacked jurisdiction over the subject matter of the action (Pet. App. 4a).

After a hearing, the district court dismissed the complaint on the ground of lack of jurisdiction (Pet. App. 1a–6a). The court, noting that Board representation determinations are generally not reviewable by district courts, concluded that the instant case did not fall within the limited exception created in *Leedom* v. *Kyne,* 358 U.S. 184 (see Gov't Br., No. 772, pp. 11–12). This is so, the court pointed out, since in *Kyne* the plaintiffs had no other adequate means of obtaining review of their contentions, while here "plaintiffs herein have refused to participate in the Board proceedings where their entire position could be aired and appropriate appeal remedies [would be] available" (Pet. App 5a).[3]

Thereafter, the Board decided the unfair labor practice charges against the Company. The Board sustained the allegations of the amended complaint, specifically rejecting the Company's contention that it was entitled to withdraw recognition from Local

[3] In explaining its reasons for dismissal for want of subject matter jurisdiction "at this time," the district court stated (Pet. App. 6a): "By allowing a group of plaintiffs to foist jurisdiction on the Court where it is not otherwise present by claiming to be deprived of certain statutory rights, the Court would invade an area which Congress intended and which properly belongs under the control and expertise of the Board. The *Kyne* exception is a narrow one and cases claiming the benefit thereof must clearly and squarely fall within the procedural ambit delineated in that decision."

400, insofar as the engineer-technician unit was concerned because of the possible invalidity of Local 400's 1951 certification (Pet. App. 64a–100a). The Company petitioned the court of appeals to review the Board's decision and order, and the court set that case for argument with the appeal that petitioner employees had taken from the district court's dismissal of their suit. The employees also intervened in the Company's proceeding to review the Board's decision and order, and were permitted to file a brief and to present oral argument in that case.

The court of appeals, in the proceeding brought by the Company, sustained the Board's findings and conclusions, and enforced its order with a minor modification (Pet. App. 101a–114a). The court also affirmed the district court's dismissal of the suit brought by petitioner employees, stating (Pet. App. 9a):

> In view of the fact that appellants had an available forum, the National Labor Relations Board, in which to litigate the matter of which they complained, with a right to review by this court, the Supreme Court's decision in *Leedom* v. *Kyne* * * * does not support the claimed jurisdiction of the district court to entertain this complaint. In these circumstances, the judicial forum could not properly be substituted for the administrative. Hence, the dismissal of the action by the district court was proper.

## ARGUMENT

The basic question which petitioners present is whether, under *Leedom* v. *Kyne*, 358 U.S. 184, they were entitled to obtain district court review of the

validity of the bargaining relationship established between the Company and Local 400, as the representative of the engineer-technician unit. But here the court of appeals sustained that relationship, at least for the present, in a proceeding brought by the Company to review the Board's unfair labor practice findings. Petitioners had an opportunity to participate before the Board and in fact participated in the court of appeals in the litigation of that precise question. Regardless, then, of the correctness of the district court's dismissal of petitioners' action, the central question which they sought to raise was resolved against them, by the same appellate court to which they took an appeal, in a companion case in which they participated. Thus, they were hardly prejudiced by the district court's action.

Moreover, the district court's dismissal of petitioners' suit was proper. As the court of appeals correctly pointed out (Pet. App. 9a), the situation here is distinguishable from that involved in *Leedom* v. *Kyne*. In that case, the Court emphasized that the plaintiffs had "no other means within their control * * * to protect and enforce [the] right" which Congress has given professional employees (358 U.S. at 190). Here, on the other hand, petitioners could have intervened and participated in the unfair labor practice proceeding before the Board—a proceeding in which the validity of the 1951 certification was a central issue.[4] As intervenors before the Board, they would have been entitled to the rights of a party to the pro-

[4] Indeed, the Trial Examiner specifically invited their intervention (*supra*, p. 4).

ceeding. NLRB Rules and Regulations, 29 C.F.R. 102.65(b); see *Potter* v. *Castle Construction Co.*, 355 F. 2d 212, 216 (C.A. 5); *Gary Steel Products Corp.*, 144 NLRB 1160, n. 1. And, if the Board's order proved to be adverse to their position, petitioners would have had standing, as persons aggrieved by a final agency order, to seek judicial review in the court of appeals, under Section 10(f) of the Act. *Shoreline Enterprises of America, Inc.* v. *National Labor Relations Board*, 262 F. 2d 933, 936–937 (C.A. 5). There is thus no justification for extending the limited exception recognized in *Kyne* to a situation where the statutory review procedure established by Congress is readily available.

Finally, petitioners, no less than the Company, accepted and acted under the bargaining relationship established by the Board's 1951 certification for an extended period of time. At least after the decision in *Leedom* v. *Kyne* in 1958, the professional employees were on notice that the original certification of Local 400 as the representative of the engineer-technician unit was of questionable validity, in light of this Court's construction of Section 9(b)(1) in that case. Yet they did not seek decertification at any time prior to 1964, when the Company and Local 400 were engaged in an unfair labor practice dispute before the Board regarding the very issue which petitioners sought to raise in the district court—the validity of the existing bargaining relationship. In these circumstances, it does not appear improper to require petitioners to await resolution of the unfair labor practice proceeding and dissipation of any unfair labor practices found before

allowing them to proceed with steps which might lead to decertification of Local 400 as their representative.[5] Dismissal of petitioners' suit by the district court was thus proper, and no issue warranting review by this Court is presented.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] As the court of appeals noted, its "decision in no way affects the right of [petitioners] to seek the removal of the union as their bargaining representative by filing another decertification petition * * * after the unfair labor practices shall be remedied" (Pet. App. 9a; see Gov't Br., No. 772, p. 12).

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